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No. 94-983

In The

Supreme Court of the United States

October Term, 1994

JOHN L. HOLAHAN, JR., in his official capacity as Chair of the Minnesota Ethical Practices Board; HUBERT H. HUMPHREY III, in his official capacity as Attorney General of the State of Minnesota,

Petitioners,

v.

SCOTT DAY, Treasurer of IMPACE-MEA; et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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Petitioners submit this brief in reply to Respondents' briefs in opposition to Petitioners' petition for a writ of certiorari.

I. THE COURT MAY GRANT CERTIORARI BECAUSE OF A CONFLICT IN PRINCIPLE BETWEEN THE DECISION OF THE COURT BELOW AND DECISIONS OF THIS COURT OR OTHER COURTS AND SHOULD DO SO HERE.

Respondent Schwietz erroneously argues that a conflict in principle between a circuit court decision and a decision of this Court or another court is not a sufficient basis upon which this Court can grant a petition for a writ of certiorari. Brief at 11. In fact, this Court has granted certiorari in cases based upon exactly such conflicts in principle. *See, e.g., Oregon Department of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 733, 764 (1985) ("appeared to conflict in principle"); *Ivan Allen Co. v. United States,* 422 U.S. 617, 623-24 (1975) (certiorari granted based on claimed "conflict in principle"). As explained in Petitioners' petition, *id.* at 17-30, there is such a conflict in principle between the Eighth Circuit's decision and decisions of this Court and other circuit courts concerning a very important issue of First Amendment law that warrants this Court's review of this case.

II. RESPONDENTS' ARGUMENTS THAT THE INDEPENDENT EXPENDITURE PROVISIONS ARE INFIRM FOR REASONS OTHER THAN THOSE EXPRESSED BY THE EIGHTH CIRCUIT ARE WITHOUT MERIT AND PROVIDE NO BASIS TO DENY THE PETITION.

Respondents argue that the Court should deny the petition in this case because the independent expenditure provisions are fatally defective for reasons besides these expressed by the Eighth Circuit. Specifically, they claim that the provisions deny political candidates equal protection, that the reporting obligations are unconstitutionally vague, and that the subsidy provisions cannot operate in a manner that will

achieve the legislature's intended purpose. As discussed below, each of these arguments is without merit and does not justify the denial of the petition.

A. Minnesota's Independent Expenditure Provisions Do Not Deny Political Candidates Equal Protection Of The Laws.

Respondents Unruh and Erickson contend that Minnesota's independent expenditure provisions "suppress" their speech and thereby deny them equal protection of the laws. Brief at 24-25. Respondents' argument is altogether incorrect for several reasons.

First, the independent expenditure provisions apply exactly the same to all political candidates including Respondents and their political opponents. Respondents state that, under the statutory scheme, independent expenditures made in support of them or in opposition to their opponents trigger an increase in their opponents' expenditure limits and a public subsidy to their opponents. While that is true, it is also true that independent expenditures made in favor of their opponents or in opposition to Respondents trigger an increase in Respondents' limits and a subsidy to Respondents assuming that they have opted to participate in the State public financing scheme. Suffice it to say, the statute does not discriminate between any candidates and, therefore, presents no equal protection problem.

Second, Respondents apparently contend that the Court should look at the following two classes of candidates for purposes of their equal protection argument: (1) those who either benefit from an independent expenditure or whose opponents are the targets of an adverse expenditure; and (2) those who are the targets of an adverse independent expenditure or whose opponents benefit from such an expenditure. There is also no equal protection problem even under this analysis because these two classes of candidates are not similarly situated. One class benefits from the independent expenditure while the other suffers as a result of it. Accordingly, the fact that the statute treats these classes differently is

entirely rational and appropriate. While the former certainly neither needs nor deserves any subsidy or expenditure limit increase as a result of a favorable independent expenditure, the latter may very well need these benefits to be able to effectively respond to adverse independent expenditures, especially when made close in time to the election.

Respondents also mislead the Court in their repeated references to the statute's "suppression" of the expenditure limits of candidates in whose favor independent expenditures are made. The statute has absolutely no effect on the expenditure limits of such candidates. Nor should it insofar as these candidates have no need for an increase in their expenditure limits when independent expenditures are made in their favor.[1] Accordingly, the statute does not, as Respondents

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[1] Likewise, there is also no problem with the "fairness doctrine," which this Court upheld in *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), because the doctrine requires broadcasters to provide the opportunity to reply to personal attacks to the individuals who are the targets of the attacks. One would not expect, nor does the doctrine require, that a broadcaster also provide an opportunity for someone to speak who was not only not the target of such an attack, but, in fact, benefited from it.

Respondents unsuccessfully try to distinguish *Red Lion Broadcasting* in regard to their First Amendment argument by claiming that the independent expenditure provisions do more than simply provide candidates with an opportunity to respond. They claim that the statute penalizes citizens for engaging in protected political speech. Brief at 16. As discussed above, and in Petitioners' petition, the statute does not penalize the candidates or those making the expenditures. Under Respondents' line of reasoning, the fairness doctrine would also violate the First Amendment because it also "chills" the protected speech rights of those wishing to make personal attacks by providing someone who has been the target of such an attack with an opportunity to respond just like the independent expenditure provisions do. Just as the fairness doctrine is not in violation of the First Amendment based on such an alleged chilling effect, neither are Minnesota's independent expenditure provisions.

suggest, restrain or otherwise decrease the expenditure limits of such candidates.

B. The Independent Expenditure Reporting Provisions Are Not Unconstitutionally Vague.

Respondent Schwietz argues that the independent expenditure reporting provisions are unconstitutionally vague because candidates cannot determine when they have become obligated to make an independent expenditure. Brief at 23-24. The Eighth Circuit did not address this issue. A14-15. The district court, however, did address precisely this argument and correctly rejected it. A40-47. As the court indicated, the proper analysis is whether the statutory language is sufficiently definite to allow ordinary citizens to understand what is required of them and to discourage arbitrary and discriminatory enforcement. A42 (citing *Kolander v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). As discussed below, the district court correctly applied this standard in concluding that Respondent's vagueness challenge must fail.

The district court initially observed that the existence of a legal obligation to make an independent expenditure is readily determined by common experience and well-established contract law and equitable principles and does not require speculation or more sophistication than that of an ordinary consumer. A42-43. Moreover, the court properly noted that political funds and committees, like several of the Respondents in this case, have a higher degree of sophistication in matters of political expenditures than ordinary persons such that their contention that they are unable to determine when they have become obligated to make an independent expenditure lacks credibility. A43.

Finally, the district court properly stated that the availability of an advisory opinion from the State Ethical Practices Board avoids any vagueness problem with the statute. A45-46. As the court stated, this Court has suggested that such an advisory opinion mechanism alleviates any vagueness problems. *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1986). In

fact, this Court affirmed a previous decision of the district court stating that precisely this same advisory opinion mechanism sufficiently alleviated any vagueness problem with a different provision of Chapter 10A of the Minnesota Statutes. *See Bang v. Chase*, 442 F. Supp. 758, 769-70 n.33 (D. Minn. 1977), *aff'd*, 436 U.S. 941 (1978). In the final analysis, the law does not require anyone to guess at its meaning or expose anyone to risk of penalty without fair warning and is, therefore, not void for vagueness. A45.

C. The Independent Expenditure Public Subsidy Provision Does Operate In A Manner That Serves Its Intended Purpose.

Respondent Schwietz argues that the Court should not review this case because the independent expenditure provisions cannot be implemented to achieve their intended result. Brief at 21. Respondent's argument is based on the erroneous belief that the statutory scheme does not permit the payment of an independent expenditure subsidy until the general election is over. *Id.* at 22. Respondent mistakenly contends that the public subsidy under the independent expenditure provisions is paid from the statutory general account and that candidates are not eligible to receive subsidies from this account until after they have obtained a certain percentage of the vote in the election. Respondent, therefore, contends that since no pre-election subsidy can be paid, the legislature's desire to give a subsidy to candidates to respond to independent expenditures cannot be met.[2]

The flaw in Respondent's analysis is that the public subsidies paid as a result of independent expenditures under Minn. Stat. § 10A.25, subd. 13(c) are paid out of a separate appropriation from the State general fund and not the statutory "general account" referenced in chapter 10A. *Id.* The eligibility requirements for subsidy payments from this account are, therefore, not applicable to the public subsidies paid as a result of independent expenditures. Section 10A.25,

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[2] The Eighth Circuit also discussed this issue in its decision. A7-8 n.2.

subd. 13(c), expressly authorizes the payment of an independent expenditure subsidy if a candidate is entitled to receive "a" public subsidy. Because a candidate who has won the primary election is entitled to "a" public subsidy from the political party account, Minn. Stat. § 10A.31, subd. 6, such a candidate qualifies for an immediate independent expenditure subsidy and need not, as Respondent argues, await the results of the general election. Because there is no prohibition on the payment of these subsidies prior to the election, and at a time when the candidates can use the money to combat adverse independent expenditures, the statutory scheme operates precisely as intended, and Respondent's argument cannot stand.

III. THE MINNESOTA LEGISLATURE COULD REASONABLY HAVE ASSUMED THAT ITS DRAMATIC REDUCTION IN THE CONTRIBUTION LIMITS APPLICABLE TO CANDIDATES WOULD LIKELY RESULT IN A CORRESPONDING INCREASE IN INDEPENDENT EXPENDITURES AND RISK TO THE STATE PUBLIC FINANCING SCHEME.

Respondents assail the State's justification for Minnesota's independent expenditure provisions as irrational. As explained in Petitioners' petition, the Minnesota Legislature could reasonably have assumed that its dramatic reduction in the contribution limits applicable to candidates would likely result in a corresponding increase in independent expenditures and a corresponding increase in the risk that such adverse expenditures pose to candidates agreeing to participate in the public financing scheme. As Amici Common Cause and Common Cause of Minnesota noted in their brief, independent expenditures in federal campaigns jumped up by over 1110 percent in the eight years after the inception of federal regulation of contribution levels. *Id.* at 5.[3] Certainly,

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[3] Several commentators have also noted that there was a similar dramatic increase in the number of political action committees in direct

the legislature's decision to counterbalance that risk to preserve the viability of the State's voluntary spending limit program was not unreasonable.

The Eighth Circuit erroneously decided that the independent expenditure provisions were not necessary because of the historically high participation rate in Minnesota's public financing scheme. The court completely failed to recognize, or even acknowledge, the likely effect of the recent contribution limit reductions on future independent expenditure levels and the threat such expenditures will likely pose to a public financing system that incorporates voluntary spending limits. One commentator elaborated on the same reasoning which prompted the United States Senate and House of Representatives to pass bills containing very similar independent expenditure provisions:

> In essence, the congressional judgment is that the proposed statutory scheme combining public funding with spending limits is unworkable without matching funds for participating candidates to respond to independent expenditures. In view of the Court's approval of the concept that public funding can be conditioned on compliance with spending limits, it is unlikely that the Court would reject Congress's judgment that the matching funds provisions are indispensable to the statutory scheme. The post-*Buckley* experience concerning the potential and actual impact of independent expenditures should afford the Court an adequate basis on which to sustain the matching funds provisions.

Stein, *supra*, at 783. These comments are equally applicable in this case.

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response to the federal limits on individual contributions. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1403 (1994); Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 Rutgers L. Rev. 743, 758 (1992).

Respondents also mistakenly rely on certain statements by Senator John Marty in claiming that the legislature's motive in enacting the independent expenditure provisions was impermissible. The threshold problem with Respondents' argument is that the law is well-established that, except for a few limited and well-defined exceptions, legislative motives are irrelevant in determining the constitutionality of a statute. As this Court made clear in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
>
> . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 48 (ellipsis in original) (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968)). The exceptions to this rule do not include cases involving content-neutral statutes which do not directly inhibit freedom of speech or some other expressive activity or enterprise. *South Carolina Education Association v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990).

Moreover, even if the intent of the legislature were relevant to the statute's constitutionality, the statements of a single senator scarcely suffice to establish the legislature's intent. As the district court aptly noted, the statements of a single senator at a hearing before a committee of a single body of a bicameral legislature are insufficient to demonstrate the collective intent of the entire legislature in subsequently enacting the final version of the bill. A26 n.2.

In addition, Respondents Day, et al., mistakenly and inaccurately cite several cases of the Minnesota Supreme Court and this Court for the proposition that "the only comments that are relevant and afforded weight in evincing legislative intent are the comments of the author of the bill." Brief at 8. First, all of the cases Respondents cite deal with a

court's resort to the legislative history to construe the meaning of ambiguous statutory provisions. In this case, no one is claiming that the Court need look at the legislative history of the independent expenditure provisions to construe their meaning. The provisions are absolutely unambiguous. In fact, Respondents have not cited this very selected legislative history to argue how the independent expenditure provision should be interpreted. Rather, they have cited it for the purpose of impugning the motivation of the legislature in enacting the law, which, as discussed above, is ultimately irrelevant to the question of the statute's constitutionality.

Second, these cases do not, in fact, state what Respondents allege. The Minnesota Supreme Court only stated in these cases that the statements of the sponsor of a bill or amendment are "generally entitled to some weight." *Handle With Care, Inc. v. Department of Human Services*, 406 N.W.2d 518, 522 (Minn. 1987); *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 263 (Minn. 1989). The court did not state that the sponsor's statements are the only relevant statements in evincing the legislature's intent. And, in fact, the court looked beyond the sponsor's statements in construing the legislative intent in the very cases Respondents cite. *Id.* Similarly, this Court remarked that the statements of one of the legislation's sponsors deserves substantial weight in interpreting a statute. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 448, 564 (1976). The Court did not state, and has never held, that this is the exclusive source of information bearing on the legislative intent of a law.

Finally, even if the intent of Senator Marty were relevant and the Court were to assume that he spoke for the whole legislature, his comments were, as the district court in this case observed, insufficient to show that the legislature acted with the intent of suppressing Respondents' First Amendment rights. A27 n.2 (*citing Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (to invalidate on equal protection grounds, a facially neutral legislative scheme, plaintiff must show that state legislature selected a particular course of action, at least in part, because of its adverse effects on an identifiable group)). After reviewing the

entire record, including the text of the legislation, the available legislative history, the background information and documents, and the representations and arguments of the State executive branch, the district court properly determined that the apparent intent of the legislature in enacting the 1993 amendments governing political campaigns and campaign financing, including the independent expenditure provisions, was to reduce the potential for corruption and the appearance of corruption in the political process. A27 n.2. This is precisely the type of governmental interest that would justify an infringement on otherwise protected speech as this Court recognized in *Buckley,* 424 U.S. at 25-26.

CONCLUSION

For the reasons stated above, and in Petitioners' petition, the petition for a writ of certiorari should be granted.

Dated: January 16, 1995

Respectfully submitted,

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